IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: PREMIER AUTOMOTIVE SERVICES, INC.	:	
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PREMIER AUTOMOTIVE SERVICES, INC.	:	
v.	:	Civil Action WMN-06-1733 Bankr. No. 05-2-0168-JS Adversary No. 05-1378
MARYLAND PORT ADMINISTRATION et al.	:	
* * * * * * * * * * * * * * * * *		
PREMIER AUTOMOTIVE SERVICES, INC.	:	
v.	:	Civil Action WMN-06-1761
ROBERT L. FLANAGAN et al.	:	

MEMORANDUM

Civil Action No. WMN-06-1733 is an appeal from a decision of the United States Bankruptcy Court for the District of Maryland: (1) granting summary judgment in favor of the defendants in Adversary Proceeding No. 05-1378; and (2) granting relief from the automatic bankruptcy stay on grounds of bad faith on the part of the purported debtor, Premier Automotive Services, Inc. (Premier). In addition to Premier's appeal of the Bankruptcy Court's decision, Appellees Maryland Port Administration (MPA),

an agency of the State of Maryland, and Robert L. Flanagan and F. Brooks Royster, III, its principal directors, have filed a motion to dismiss the bankruptcy petition. Paper No. 19. Also to be resolved in Civil Action No. WMN-06-1733 is whether MPA should be held in civil contempt for actions taken by MPA immediately after the Bankruptcy Court issued the ruling that is now being appealed.

Civil Action No. WMN-06-1761 is a separate action filed by Premier under the provisions of the Shipping Act of 1984, as amended, 46 App. U.S.C. § 1701 et seq. (the Shipping Act) against Flanagan and Royster. This second suit arises out of the identical factual circumstances as the bankruptcy appeal and, thus, the Court will address both actions in this same memorandum. Pending in Civil Action No. WMN-06-1761 is Defendants' motion to dismiss. Paper No. 5.

The Court finds that no hearing is necessary as to any of the pending motions and that the decision of the Bankruptcy Court shall be affirmed, MPA's motion to dismiss the bankruptcy action shall be granted, and the motion to dismiss filed by Flanagan and Royster in the Shipping Act case will also be granted. As for the contempt issue, the Court concludes that it will not find MPA and its counsel in contempt.

I. FACTUAL AND PROCEDURAL BACKGROUND

These actions arise out of the efforts of Premier and MPA to

negotiate a new lease for "Lot 90," a parcel of land of approximately six and one-half acres owned by MPA and located in the Dundalk Marine Terminal. After these efforts failed to produce a lease that was satisfactory to Premier, Premier has used these legal actions which invoke various federal stay provisions to provide an alternative means to keep Premier in possession of Lot 90 for as long as possible. Unfortunately, while these actions abound in legal creativity, they generally lack legal merit.

Premier is an import/export vehicle processor. Although it has engaged in the processing of automobiles in the past, it represents that its current business is focused on processing trucks and heavy military, agricultural, and construction equipment. Premier has been operating a vehicle processing business on Lot 90 for more than forty years. It first leased the property in 1964 and, upon entering the lease, built a building on the property (hereinafter, "the Building") which it has owned, occupied, and used since that time to perform its various services. In addition to Premier's field office, the Building contains a wash line, a body and paint shop, a break room for Premier employees, and an equipment room.

Over the years, Premier has occupied Lot 90 under a number of different leases. In July of 1992, Premier and the MPA entered into a five year lease, with an option to renew for five

additional years. Premier exercised that option in 1997 but it is undisputed that this renewed lease expired on June 30, 2002. Thereafter, pursuant to a holdover provision in the July 1992 lease, Premier occupied Lot 90 as a month-to-month tenant paying a monthly rent of 125% of the published tariff. MPA offered several proposed long term leases but they were unacceptable to Premier. On March 29, 2005, after three years of unsuccessful negotiations, MPA requested that Premier vacate Lot 90 on or before May 1, 2005. MPA also informed Premier that it had leased Lot 90 to another vehicle processor, Pasha Automotive Services (Pasha). Two days before it was to vacate the premises, however, on April 29, 2005, Premier filed for bankruptcy under Chapter 11, thus invoking the automatic stay provision of § 362 of the Bankruptcy Code.

On May 6, 2005, Premier filed an adversary proceeding in the bankruptcy case against: MPA; Robert Flanigan, in his official capacity as Secretary of the Maryland Department of Transportation; and, M. Kathleen Broadwater, in her official capacity as Acting Director of MPA.[1] As subsequently amended, Premier's complaint asserted claims under three legal theories:

[1] Premier subsequently amended its complaint to substitute F. Brooks Royster, III, in his official capacity as Executive Director of MPA, in place of Ms. Broadwater. It also appears that Premier dropped its direct claims against MPA. See Second Amended Compl. ¶ 7.

substantive due process, equal protection, and unlawful taking.[2] On October 28, 2005, MPA filed a motion for relief from the automatic stay so that it could retake possession of Lot 90. After a two-day evidentiary hearing held on December 2 and 8, 2005, Bankruptcy Judge James F. Schneider indicated from the bench that he would lift the stay and that a written opinion and order to that effect would issue shortly thereafter. On December 27, 2005, Defendants moved for summary judgment on the complaint in the adversary proceeding. After oral argument held on March 7, 2006, Judge Schneider indicated that this motion would be granted as well, with a written opinion and order to follow. On June 8, 2006, Judge Schneider issued the written opinion and order memorializing his previous rulings.

Under the Federal Rules of Bankruptcy Procedure, "[a]n order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 4001(a)(3). In its motion to lift the § 362 automatic stay, MPA also requested that the Bankruptcy Court "order otherwise" and exempt this action from

[2] Premier added a fourth claim under 11 U.S.C § 525 which related to a different lot leased from MPA by Premier, Lot 401. Premier indicates that this claim was later mooted by MPA's acquiescence to the relief sought and further represents that this claim is not germane to these pending actions. See Appellant Br. 13 n.4.

the automatic stay of Rule 4001(a)(3). Judge Schneider's Memorandum and Order, however, was silent on that issue. Thus, MPA remained unable to lawfully evict Premier from Lot 90 for at least another ten days.

On June 9, 2006, Premier filed this appeal from Judge Schneider's order of the previous day and also filed a motion for stay pending appeal pursuant to Rule 8005 of the Bankruptcy Rules. On June 12, 2006, the Bankruptcy Court, with the agreement of counsel, scheduled a hearing for June 19, 2006, on the motion for stay pending appeal. On the evening of June 12, however, police under the direction of MPA broke into and seized Premier's premises on Lot 90, arresting one of Premier's employees. The following day, Premier requested and was granted an emergency hearing before the Bankruptcy Court regarding the events of the previous night. At the hearing, Judge Schneider was highly critical of MPA for violating Rule 4001(a)(3).[3] Judge Schneider then proceeded to consider Premier's motion for a stay pending appeal and summarily granted same.

In the meantime, a few weeks after Judge Schneider announced in the December 8, 2005, hearing his intention to lift the bankruptcy stay, Premier filed a complaint with the Federal Maritime Commission (FMC) based upon the identical facts that

[3] It is based upon MPA's actions on the evening of June 12, 2006, that Premier requests MPA be held in contempt of court.

were presented in the adversary proceeding before the Bankruptcy Court. Instead of constitutional claims, however, Premier re-cast those allegations as claims under the federal Shipping Act. The defendants in that action, Flanagan and Royster, moved to dismiss the complaint and FMC Chief Administrative Law Judge Krantz granted that motion on March 31, 2006. Judge Krantz found that the relief requested was inconsistent with principles of state sovereign immunity. Premier has appealed that decision to the FMC, where it remains pending.

Premier then filed its second action in this Court, Civil Action No. WMN-06-1761, asserting similar claims under the Shipping Act as those asserted in the FMC complaint. As relief, Premier seeks a preliminary injunction pursuant to section 11(h)(2) of the Shipping Act, 46 App. U.S.C. § 1710(h)(2), enjoining MPA Defendants from evicting Premier from Lot 90 pending final judgment on the appeal before the FMC.[4] Premier also seeks a permanent injunction enjoining Defendants from evicting Premier from Lot 90 "pending conclusion of good faith negotiations for a new Premier lease at Lot 90." Prayer for Relief (B)(2).

II. DISCUSSION

[4] Section 1710(h)(2) allows a district court upon an appropriate showing to issue a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the FMC has issued an order disposing of the complaint. App. U.S.C. § 1710(h)(2).

A. Sovereign Immunity

Because resolution of the issue of sovereign immunity under the Eleventh Amendment is potentially dispositive of both the Bankruptcy Case and the Shipping Act Case, it requires a brief discussion.

It is undisputed that MPA is an arm of the State of Maryland and thus, is protected by sovereign immunity from a private suit. See Ceres Terminals Inc. v. Maryland Port Administration, 30 S.R.R. 804 (2004). To avoid this bar, Premier named Flanagan and Royster as the defendants in the bankruptcy adversary action (as amended) and the Shipping Act case, instead of MPA. Under the well-established exception to sovereign immunity established in Ex parte Young, 209 U.S. 123 (1908), individuals acting in their official capacity for the State may be sued for prospective injunctive relief. See Antrican v. Odom, 290 F.3d 178, 184 (4th Cir. 2002) ("The Ex Parte Young exception to Eleventh Amendment . . . allows private citizens, in proper cases, to petition a federal court to enjoin State officials in their official capacities from engaging in future conduct that would violate the Constitution or a federal statute.").

Flanagan and Royster, however, argue that both of Premier's actions against them are barred by an exception to the Ex parte Young exception, the contours of which were outlined in Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997). Under the

Coeur d'Alene exception to the exception, sovereign immunity bars a suit notwithstanding Ex parte Young when the injunctive relief sought "implicates special sovereignty interests." 521 U.S. at 281. Flanagan and Royster argue that, because the injunction Premier is seeking in both actions is an "attempt to gain an interest in a particular portion of sovereign state land," Shipping Act Case Reply 13, the issuance of the injunction would implicate these special interests and Premier's cases are therefore barred under Coeur d'Alene.

Coeur d'Alene was a suit brought by an Indian Tribe to establish the Tribe's ownership rights to submerged lands within the boundaries of its reservation. Even though the suit was brought against state officials alleging an ongoing violation of federal law and sought only prospective injunctive relief, the Court held that this was not enough to invoke the Ex parte Young doctrine. The Court noted, "this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." 521 U.S. at 281. Highlighting the uniqueness of the action, the Court recited the broad ramifications of the requested relief:

> [S]ubstantially all benefits of ownership and control would shift from the State to the Tribe. This is especially troubling when coupled with the far-reaching and invasive relief the Tribe seeks, relief with consequences going well beyond the typical stakes in a real property quiet title action. The suit seeks, in effect, a determination

> that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

521 U.S. at 282. The Court then reviewed, at length, the unique status of submerged lands under its own precedent, under English common law, and "from ancient doctrines." 521 U.S. at 283-287; see specifically id. at 283 ("State ownership of [lands underlying navigable waters] has been 'considered an essential attribute of sovereignty.'") (quoting Utah Div. Of State Lands v. United States, 482 U.S. 193, 195 (1987)).

The case at bar does not implicate sovereign interests remotely equivalent to those implicated in Coeur d'Alene. While Maryland might have a special interest in land contiguous to its harbors, Premier is not seeking the kind of control over Lot 90 that was sought in Coeur d'Alene. Premier's requested relief would not affect Maryland's title to Lot 90, nor its regulatory authority over Lot 90. At most, Premier is seeking a fixed term lease. As discussed in more detail below, Premier argues that it is not even asking for a lease, but simply the "fair opportunity to negotiate for a commercially reasonable lease." Premier Bankr. Br. 28.

None of the cases cited by MPA interpreting Coeur d'Alene support that decision's applicability here. For example, MPA relies on Ysleta Del Sur Peublo v. Raney, 199 F.3d 281 (5th Cir. 2000). In Ysleta Del Sur Peublo, an Indian Tribe brought an action to eject state officials from a piece of state owned land. In concluding that the suit was barred by sovereign immunity under Coeur d'Alene, the Fifth Circuit equated the suit as one "attempt[ing] to persuade us to declare [the state's] title null and void." 199 F.3d 286. In addition to vitiating the state's title in the property at issue, the court also concluded that the requested relief would "significantly alter the State's regulatory control over the Property because the Property will be considered part of an Indian reservation under federal control." Id. at 290. Here, Premier's requested relief bears no similar impacts. Other cases cited by the parties rejecting the application of the Coeur d'Alene doctrine stress the limited reach of that doctrine. See, e.g., Arnett v. Myers, 281 F.3d 552, 567-68 (6th Cir. 2002) (in action by duck blind owners to enjoin state officials from removing their blinds from a state owned lake, holding that the relief sought "does not begin to approach the far-reaching and invasive relief sought by the Tribe under the particular and special circumstances of Coeur d'Alene, and this court does not read the ruling of Coeur d'Alene to extend to every situation where a state property interest is implicated"); Lipscomb v. Columbus Mun. Separate School Dist., 269 F.3d 494, 501 (5th Cir. 2001) (characterizing the requested

relief in Coeur d'Alene as relief that would "strip the State of all of its jurisdiction and power over the land" and distinguishing that relief from the declaration sought in the case before it, noting that if that declaration were issued, "Mississippi would retain jurisdiction over the leased lands; indeed, title to the lands would remain in Mississippi. The State's basic police and taxing power would not be affected."); Elephant Butte Irrigation Dist. V. Dept. of the Interior, 160 F.3d 602, 612 (10th Cir. 1998) (finding no sovereign immunity and opining that the holding of Coeur d'Alene "reflects the extreme and unusual case in which . . . the suit is prohibited because it involves 'particular and special circumstances'").[5]

Accordingly, the Court concludes that neither the Bankruptcy case nor the Shipping Act case is barred by sovereign immunity under the Eleventh Amendment. The Court must now turn to the merits of each action.

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[5] As support for its assertion that its claims are not barred by sovereign immunity, Premier also repeatedly harkens back to a decision of the undersigned, Project Life, Inc. v. Glendening, 139 F. Supp. 2d 703 (D. Md. 2001). That case is inapposite. Project Life did result in this Court issuing an injunction requiring MPA to enter into a lease with a particular client. That case is of no assistance to Premier here, however, because Project Life was an action that arose under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131-12134. That statute includes a valid abrogation of sovereign immunity. Id. at 707 n.5. Furthermore, because the defendants in that action "concede[d] that, under the doctrine of Ex parte Young [] Plaintiff can obtain an injunction for the prospective enforcement of federal law without regard to the validity of the the abrogation of sovereign immunity," id. at n.4, the applicability of the Coeur d'Alene doctrine was never raised nor considered.

B. The Bankruptcy Case[6]

It is undisputed that the viability of the constitutional claims asserted in the adversary action is at the crux of Premier's Chapter 11 bankruptcy.[7] Premier has filed no plan of reorganization, candidly acknowledging that "Premier's plan for reorganization is this litigation." Premier's Br. 40 (emphasis in original). Therefore, the Court starts its discussion of the bankruptcy case by examining the merits of Premier's constitutional claims.

1. Premier's Constitutional Claims

In Count I of the Second Amended Complaint, Premier asserts a denial of substantive due process. To succeed on a substantive due process claim, a plaintiff must show that it was arbitrarily and capriciously deprived of a "cognizable property interest, rooted in state law." Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir. 1983). Property interests protected by due process are neither created nor defined by the Constitution. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure

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[6] Unless otherwise noted, pleadings referenced in Section B of this Memorandum refer to pleadings filed in Civil Action No. WMN-06-1733.

[7] As Premier observes, "[a]t the end of the day, the question framed in this appeal remains straightforward: has Premier articulated legitimate property interests of a constitutional dimension that warrant protection by the Bankruptcy Court and trial on the merits?" Premier Reply at 3.

certain benefits and that support claims of entitlement to those benefits." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). In order for a person to have a property interest in some benefit, "[h]e must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. Furthermore, substantive due process protects only those interests that are "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). The doctrine of judicial self-restraint requires courts to "exercise the utmost care" when presented with a request to define or develop rights in this area. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

Count II of the Second Amended Complaint asserts a claim under the Takings Clause of the Fifth Amendment. This clause prohibits the taking of "private property" "for public use, without just compensation." This limitation on governmental power has been imposed on the states through the Fourteenth Amendment. See Phillips v. Washington Legal Foundation, 524 U.S. 156, 163 (1998). Like the Due Process Clause, the Takings Clause protects private property; it does not create it. See Phillips, 524 U.S. at 164. Thus, in identifying a property interest so protected, we must again look to "traditional rules of property law to determine whether a constitutionally protected property interest exists." Washlefske v. Winston, 234 F.3d 179, 184 (4th Cir. 2000).

In Count III of the Second Amended Complaint, Premier

attempts to bring a claim for a violation of the Equal Protection Clause of the Fourteenth Amendment. Premier alleges that "under the guise of its regulatory and management authority," MPA "intentionally singled out Premier from a group of similarly situated persons" when it refused to offer Premier a "commercially fair and reasonable lease." Am. Compl. ¶¶ 56, 57. This is a somewhat unusual equal protection claim. In the typical claim, the plaintiff alleges ill treatment or denial of some benefit based upon the plaintiff's membership in some disfavored class, usually defined by some characteristic such as race, religion or gender. By alleging that it was "singled out," however, Premier is essentially arguing that it is a "class of one" that has suffered discriminatory treatment. The Supreme Court has expressly recognized "class of one" equal protection claims. See Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); see also, Willis v. Town Of Marshall, 426 F.3d 251, 263 (4th Cir. 2005) ("[The plaintiff's] allegations of arbitrary singling-out by the Town are sufficient to support an Olech 'class of one' claim."); Esmail v. Macrane, 53 F.3d 176, 179-80 (7th Cir. 1995) (holding that "[i]f the power of government is brought to bear on a harmless individual merely because a powerful state or local

official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court" under the Equal Protection Clause even though the individual is not a member of an identifiable group).

It is important to note, however, that when a government classification does not burden the exercise of a fundamental right or disadvantage a member of a suspect class, the government need only show a reasonably conceivable state of facts that could provide a rational basis for the classification. Board of Tr. v. Garrett, 531 U.S. 356, 367 (2001). This rational basis review also applies when the government intentionally treats a "class of one" differently than other similarly situated individuals. See Olech, 528 U.S. at 564.

At least as to the Due Process and Taking Clause claims, the preliminary issue is whether Premier had a constitutionally protected property interest.[8] The alleged property interests identified in the Second Amended Complaint as giving rise to the Due Process claim include the ownership of the Building and other

[8] By intertwining its discussion of the three different constitutional claims, MPA improperly imposed a burden on Premier to identify a "protected property interest" in order to succeed on its equal protection claim. See MPA Brief at 28 ("Premier had no property interest . . . of which it could have been deprived by denial of substantive due process or equal protection, or by uncompensated taking"). "It is not necessary [, however,] to prove a deprivation of property to establish a violation of the equal protection clause." Mahone v. Addicks Utility Dist. of Harris County, 836 F.2d 921, 931 (5th Cir. 1988). See also Esmail, 53 F.3d 176, 180 (7th Cir. 1995) ("the equal protection clause . . . does not require proof of a deprivation of life, liberty, or property").

improvements on Lot 90, as well as the value and goodwill of Premier's business. Second Am. Compl. ¶¶ 35-38. In support of its Takings Clause claims, Premier asserts that its "present and ongoing leasehold interest in Lot 90, as well as the Building and fixtures on Lot 90" is the property taken. Id. ¶ 49. The factual record, however, does not support the conclusion that Premier had any legitimate expectation in any of this "property."

The last lease pursuant to which Premier occupied Lot 90 contained a clause that provided, upon the termination of the lease, or any renewal thereof, the Building would either be removed by Premier at Premier's expense or, if MPA consents, would be considered abandoned by Premier and would become the property of MPA, without the payment of any consideration.[9]

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[9] Section 4.2 of the 1992 Lease provided:

> Any and all buildings, fixtures, machinery equipment or improvements installed, erected or caused to be erected by PREMIER upon the leased premises at PREMIER's expense shall be owned by PREMIER and must be removed by it at its expense upon the termination of this LEASE or any renewal thereof, or, in the event that PREMIER requests, in writing, MPA's permission to leave any and all buildings, fixtures, machinery, equipment or improvements erected and intact and MPA specifically notifies PREMIER in writing that MPA specifically allows and agrees that the buildings, fixtures, machinery, equipment or improvements, erected by PREMIER may remain in place, PREMIER shall be deemed to have abandoned all of its property in the buildings or other fixtures, machinery, equipment or improvements left behind to MPA.
>
> In the event that MPA does allow and agree that the buildings, fixtures, machinery, equipment or improvements erected by PREMIER are to remain intact after the termination date of this LEASE or any renewal thereof, PREMIER agrees that ownership of all the aforementioned buildings, fixtures, machinery, equipment or improvements shall pass to, and be made the property of MPA, free and clear of all liens and encumbrances, and without

Thus, under the unambiguous terms of the lease, Premier possesses no property interest in the Building upon the expiration of the lease. The record is clear that the renewed lease expired on June 30, 2002. While Premier represents that it remains on Lot 90 under a month-to-month "hold-over" provision in the lease, that representation is also inconsistent with the record. On April 30, 2004, after two years of unsuccessful lease negotiations, MPA sent a letter to Premier stating that Premier would be put on "overflow status" as of May 15, 2004, if it did not sign a new lease. Thus, while Premier may have continued to make payments, it did so consistent with MPA's scheduled rates for overflow storage, not pursuant to any lease, hold-over or otherwise. Regardless, Premier does not explain how a permissive holding-over could give rise to a constitutional claim of entitlement to any ongoing leasehold interest. Certainly, it could not.

In its more recent pleadings, Premier essentially concedes that it had no protected property interest in the Building or in any particular leasehold for Lot 90. Instead, Premier now identifies the "right to do business" and the "right for fair negotiations with the state in the leasing of state-owned property" as the "property rights of a constitutional dimension" upon which it bases its claims. Premier Br. at 34. Premier's reliance on the "right to do business" as its protected property right is somewhat of a red herring. Premier is certainly

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the payment of any consideration whatsoever therefor. . . .

correct, in general terms, that "[t]he right to pursue a lawful business is a constitutionally protected property interest." Premier Br. 30 (quoting Davinci Art Galleries, Ltd. v. New York, 1977 U.S. Dist. LEXIS 16360, *15-16 (S.D.N.Y 1977)). What Premier is actually asserting, however, is that it has a right to do business on Lot 90. Throughout its pleadings, Premier strenuously argues that the Building and the facilities therein are essential to its business. Premier Br. 5 ("Simply stated, Premier could not provide full services to its customers at the Terminal, much less compete for new business, without the critical facilities [located in the Building on Lot 90]."), 44 (arguing that if Premier was forced to move from Lot 90, "it would destroy Premier's business because Premier needs its building to operate"). In fact, the only means Premier identifies by which MPA is alleged to be depriving it of the right to do business is by not granting Premier a new lease for Lot 90. But, as stated above, under the terms of the lease voluntarily entered into by Premier, Premier has no legitimate entitlement to a new lease for Lot 90, or any continued ownership interest in the Building.

Thus, the only potential "property interest" remaining that could possibly support Premier's constitutional claims is its purported "right for fair negotiations." In summarizing the nature of its claims, Premier declares that it "simply seeks an injunction requiring fairness by MPA, a state agency, in the negotiating process for a lease. Entitlement to fair

negotiations for a successor lease at a state-run port facility is well within the scope of constitutional protections afforded to a citizen." Premier Br. at 25. Stating its position even more emphatically, Premier asserts, "[a]ll that Premier asks is for fairness by a state agency in the negotiating process. That is, Premier is not asking for a specific lease, or for that matter, any lease. Premier is simply asking that it be afforded a fair opportunity to negotiate for a commercially reasonable lease." Id. at 28; see also, id. at 32 ("even if it has no right to a particular lease, Premier is constitutionally entitled to be given a fair opportunity for a lease").

This Court, however, is not convinced that Maryland law recognizes an entitlement to good faith and fair dealing in contract negotiations that rises to constitutional dimensions. Maryland courts have held that there is an implied duty of good faith and fair dealing where there is an actual contract. Wootton Enter., Inc. v. Subaru of America, Inc., 134 F. Supp. 2d 698 (D. Md. 2001). Notwithstanding that implied duty in existing contracts, however, this Court, as well as the Fourth Circuit, has consistently held that there is no separate cause of action for breach of the duty of good faith and fair dealing. See Swedish Civil Aviation Admin. v. Project Mgmt. Enters., Inc., 190 F. Supp. 2d 785, 794 (D. Md. 2002); Paramount Brokers, Inc. v. Digital River, Inc., 126 F. Supp. 2d 939, 945 (D. Md. 2000); Abt Assoc., Inc. v. JHPIEGO Corp., 104 F. Supp. 2d 523, 534 (D. Md. 2000); Baker v. Sun Co. (R & M), 985 F. Supp. 609, 610 (D. Md.

1997); Howard Oaks, Inc. v. Md. Nat'l Bank, 810 F. Supp. 674, 677 (D. Md. 1993); Marland v. Safeway, Inc. 65 Fed. Appx. 442, 449 (4th Cir. 2003) ("We agree with the weight of this authority that no independent cause of action of this type is recognized in Maryland."). If Maryland courts so limit the means to enforce an obligation for good faith and fair dealing where there is an existing contract, any claim of entitlement to good faith in the negotiation of a future contract is even more attenuated.

While neither party nor the Court's own research has identified a decision under Maryland law reaching the precise issue of whether the right to fair negotiations is a constitutionally protected property interest, this Court notes that numerous courts applying similar law from other states have found that it is not. For example, in Stone Mountain Game Ranch, Inc. v. Hunt, 746 F.2d 761 (11th Cir. 1984), a corporation operated an animal attraction on land leased in a state park. After the association that operated the state park refused to renew the corporation's twenty year lease or to purchase the corporation's business, the corporation brought a § 1983 action against the association. Looking to Georgia property law to determine if the corporation had a protected property interest, the Eleventh Circuit concluded that it had no such interest.

> In contemplating whether to renew a lease, a landlord has the right to bargain for the best possible rent, and terms, it can obtain. (Here, the individual defendants had a fiduciary duty to their corporate employer to do so.) The landlord should, of course, expect the tenant to do likewise. If it fails to negotiate a favorable renewal, the

> landlord has the absolute right to get its property back when the lease expires. The tenant, on the other hand, has the right not to renew. If it desires not to renew, or if, as here, it wishes to renew but is unable to negotiate a deal, the tenant has an obligation to quit the premises and should expect the landlord to enforce that obligation. In sum, the tenant has no property right when renewal negotiations fail.

746 F.2d at 764. The court also held that "[t]he tenant has no property interest in having the landlord purchase its business." Id. at 765. Furthermore, and of particular significance to the case at bar, the court reached these conclusions even though the complaint contained allegations that "the defendants intentionally delayed negotiations, and ascribe[d] to [the association's agents] an array of ill will, bad motives, and tortious conduct including fraud, deceit, and misrepresentation." Id. at 765-66; see also, Waltentas v. Lipper, 636 F. Supp. 331, 335 (S.D.N.Y. 1986) ("The right to good faith negotiation is a contract right, not a property interest."), aff'd, 862 F.2d 414, 419 n.1 (2nd Cir. 1988) (agreeing with the district court that the implied obligation of good faith and fair dealing "'is a contract right, not a property interest,' and thus not entitled to section 1983 protection.").

The primary decision upon which Premier relies as support for its constitutional claims is Baltimore Import Car Serv. & Storage, Inc. v. MPA, 265 A.2d 866 (Md. 1970).[10] In Baltimore

[10] Because this case was analyzed under the Equal Protection Clause, the court did not need to determine whether the plaintiff had identified a protected property interest. See, supra, n. 8.

Import, the plaintiff, an automobile importer, complained that the Maryland Port Authority [the Authority][11] was refusing to lease it land at the terminal because of an exclusive contract that the Authority had entered into with the plaintiff's competitor. On preliminary motions, the trial court granted judgment for the Authority. In reversing that decision, the Maryland Court of Appeals held that "the facts alleged in Baltimore Import's petition, if supported by competent evidence and not justified by the Authority, might well establish a course of conduct so repugnant to fair dealing as to entitle the petitioner to relief. The Authority's unexplained refusal to lease to Baltimore Import may well involve the denial of equal protection guaranteed by the Fourteenth Amendment . . . ." 265 A.2d 870. The Court of Appeals opined that it was "not so much the exclusivity, but the somewhat unusual economics of the arrangement between the Authority and [the plaintiff's competition] which may well merit examination." Id. Those "unusual economics" included contract provisions whereby the competitor received "each year from the Authority for performing routine services more than twice the amount [the competitor] pay[s] the Authority in rent." Id. The plaintiff also alleged that its competitor violated Maryland's conflict of interest statute when it entered into its lease while an agent of the Authority. 265 A.2d at 870-71.

Unlike the Maryland Court of Appeals when it reviewed the

[11] The Maryland Port Authority is the former name for MPA.

lower court's decision in Baltimore Imports, this Court reviews the decision of the Bankruptcy Court under a much more developed evidentiary record. That record, including documents submitted by Premier with its complaint, suggests no similar "course of conduct repugnant to fair dealing." In fact, the Court finds no evidence to undermine the conclusion that, in negotiating with Premier, MPA was acting in a reasonable manner to advance legitimate goals, consistent with its legislated purpose.

Premier's two primary complaints with the terms offered by the MPA relate to the "throughput" and "relocation" provisions included in the lease. The proffered lease required Premier to guarantee that it would process a minimum of 1,700 vehicles per acre of usable vehicle storage area of the leased premises per lease year.[12] If Premier failed to meet that minimum "throughput," it was liable for penalties on a per-vehicle basis. The lease also provided that MPA could relocate Premier's operations, without Premier's consent, to a comparable facility with similar berth access within the terminal at MPA's sole

[12] Premier complains that while a 1,700 vehicle throughput might be reasonable for a processor of automobiles, it is unreasonable for a vehicle processor handling trucks and agricultural and construction equipment given the greater space per vehicle required in the those operations. In making its comparisons with other lessees, Premier initially ignored the fact that, during the negotiations, MPA offered to reduce the percentage of leased acreage to which the requirement would apply. MPA's April 2004 lease proposal that Premier rejected applied the 1,700 throughput requirement to only 47% of the leased acreage, yielding a throughput requirement of only 798 vehicles per total leased acre. This throughput figure is significantly less than the allegedly more favorable requirements offered other tenants.

discretion.

MPA explains that its legislated purpose is "'to increase the waterborne commerce of the ports of this State and, by doing so, benefit the people of this State.'" MPA Br. at 31 (quoting Md. Code Ann., Transp. § 6-102(c)(1)). MPA then argues that it is certainly conceivable and rational that, in furtherance of this mission, it would require a substantial vehicle throughput level for leased property and would attempt to retain the flexibility to relocate tenants to accommodate new leasing opportunities. Most of the leases for other MPA tenants that were submitted by Premier contain similar provisions. In fact, the lease for Lot 90 that MPA offered to Pasha, which Pasha accepted, contained these same provisions.[13] The bottom line, however, is that Pasha was willing to enter a long term lease, accepting provisions that are more favorable for MPA than those which were rejected by Premier. MPA's desire for a long term lease of its property under the most favorable terms that it could obtain is certainly a conceivable basis for its decision and MPA's decision rationally serves its legislated purpose.[14]

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[13] The only significant difference identified by Premier between the lease offered Premier and the lease accepted by Pasha is that Pasha was given five years to build up its business to the minimum throughput level. It is not unreasonable, however, for a new tenant to be given time to develop its business.

[14] Premier devotes considerable discussion throughout its pleadings to Pasha's criminal conviction arising out of contracts Pasha had with the Department of Defense. Pasha was temporarily suspended from doing business with the government. It seems uncontested, however, that MPA was unaware of this history when it leased Lot 90 to Pasha. Furthermore, it is undisputed that

For all these reasons, this Court finds that Premier's constitutional claims are unsupportable. Accordingly, this Court concludes that the Bankruptcy Court properly granted summary judgment for the defendants in the adversary action. In light of this conclusion, most of the remaining issues in the bankruptcy action are rendered moot. As Premier acknowledges that the constitutional claims were the only "property" of the bankruptcy estate, once judgment is entered against Premier on those claims, there is no longer any property to be protected by the automatic bankruptcy stay. Thus, the propriety of the Bankruptcy Court's decision to lift the stay, for whatever reason, effectively becomes a moot point.

2. Civil Contempt

One issue arising out of the bankruptcy case remains unresolved: Should MPA be held in civil contempt for its actions in taking brief repossession of Lot 90 on the night of June 12, 2006?

As mentioned above, when MPA filed its motion for relief from the automatic bankruptcy stay of § 362, it also requested that Judge Schneider waive the ten-day stay under Rule 4001(a)(3) that ordinarily follows any order granting relief from the automatic stay. Because Judge Schneider's order of June 8, 2006,

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Pasha has been in good standing with the federal government since April 16, 2004. While Premier argues in the Shipping Act case that MPA should have favored an "honest, locally-based, long-time tenant" over "an out-of-state company convicted of multiple price-fixing felonies," Shipping Act Opp. 10, the fact remains that Pasha was willing to accept terms that Premier was not.

stated that MPA's motion was granted, without noting any exceptions or reservations, MPA counsel, Assistant Attorney General Peter Taliaferro, states that he reasonably believed that MPA's request for the waiver of the ten-day stay was granted as well. Taliaferro then set in motion the plan to take possession of Lot 90 on the evening of June 12.

Meanwhile, on the morning of June 12, the Bankruptcy Court telephoned Assistant Attorney General T. Byron Smith to schedule the hearing on Premier's motion for a stay pending appeal. When Smith contacted Taliaferro to inform him of the hearing date, Taliaferro relayed to Smith his plans to take immediate possession of Lot 90. Smith expressed reservations about that course of conduct, and suggested that Taliaferro take a look at Rule 4001(a)(3). While Taliaferro states that he did review the rule, he nonetheless went forward with the planned repossession of Lot 90.

Premier is correct that the explanation now offered by MPA counsel for their conduct leaves open some serious questions, particularly as to the reasonableness of Taliaferro's decision-making process. To proceed with a such a confrontational course of action in reliance on what he knew was an ambiguous order and that was against the advice of his co-counsel was, as he now agrees, imprudent. The Court is particularly troubled that MPA went forward with this action immediately after it was contacted by the Bankruptcy Court to schedule a hearing on Premier's motion to stay pending appeal. Counsel certainly knew that the actions

planned would effectively moot the issue to be addressed at the just-scheduled hearing and yet, counsel declined to inform the Bankruptcy Court of the intended course.

Notwithstanding these significant concerns, the Court concludes that a finding of contempt is not warranted. While undeniably imprudent in hindsight, counsel had an arguable basis for the conclusions drawn. Furthermore, it is not clear that there is any additional remedy to which Premier would be entitled should the Court find MPA in contempt. Remedies for civil contempt are limited to those designed to coerce the offending party into compliance with the court's orders and rules and to compensate those who have been harmed by the contemnor's conduct. United States v. United Mine Workers, 330 U.S. 258, 304 (1946); In re Promower, Inc., 74 B.R. 49, 50 (D. Md. 1987). Civil contempt remedies are not to be punitive. In re General Motors Corp., 61 F.3d 256, 259 (4th Cir. 1995). Here, there is no need for a coercive remedy as MPA returned possession of Lot 90 to Premier within 24 hours. As to any need for the award of compensatory damages, it is clear that the net result of MPA's actions on June 12 was the bestowal of a considerable benefit on Premier. MPA's actions triggered an immediate hearing before the Bankruptcy Judge in which he granted Premier's motion for a stay pending appeal without Premier having to incur the expense of briefing the motion or preparing for the hearing. It is also clear given the "one-sided" nature of Judge Schneider's decision granting MPA's motions that, were it not for MPA's imprudent

conduct, Judge Schneider would have denied Premier's motion for a stay at the scheduled June 19 hearing. Because of MPA's rush to take possession, Premier has enjoyed several months of continued possession of Lot 90 that it would not have otherwise enjoyed. These benefits far outweigh any damages Premier may have suffered because of a one day disruption of its business operations.[15]

Given the history of this litigation, the Court is concerned about next steps. It is anticipated that Premier will appeal this decision and will also move for a stay pending that appeal. To avoid any confusion and consistent with the automatic stay provision of Rule 62 of the Federal Rules of Civil Procedure, the Court hereby orders that MPA shall take no action to enforce this judgment during the ten days following its entry.

C. The Shipping Act Case[16]

In the Shipping Act Case, Premier alleges that Flanagan and Royster violated sections 10(d)(1), (3), and (4) of the Shipping Act. 46 App. U.S.C. § 1709(d)(1), (3), and (4). Section 10(d)(1) makes it unlawful for a "marine terminal operator" to "fail to establish, observe and enforce just and reasonable regulations and policies related to or connected with the receiving, handling, storing or delivering of property." Id. §

[15] Premier also references damages suffered by the employee that was arrested on the night of June 12. Those damages are damages of the employee, not Premier.

[16] Unless otherwise noted, pleadings referenced in this Section C of this Memorandum refer to pleadings filed in Civil Action No. WMN-06-1761.

1709(d)(1). Section 10(d)(3), by incorporation of § 10(b)(10), id. § 1709(b)(10), makes it unlawful for a "marine terminal operator" to "unreasonably refuse to deal or negotiate." Id. § 1709(d)(3). Section 10(d)(4) makes it unlawful for a "marine terminal operator" to "give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." Id. § 1709(d)(4).

The obvious infirmity of Premier's claims under these sections of the Shipping Act is that Premier does not, and cannot, allege that Flanagan and Royster are "marine terminal operators." Premier's Complaint does allege, and it is undisputed that "[t]he MPA is a Marine Terminal Operator as that term is defined in the Shipping Act, 46 [App. U.S.C.] §§ 1701-1721 (see 46 [App. U.S.C.] § 1702(14))."[17] Shipping Act Complaint ¶ 12. Premier, however, does not name MPA as a defendant in its Shipping Act case as Premier concedes that MPA, as a state agency, enjoys sovereign immunity from such claims. As to the two defendants that the Shipping Act Complaint does

[17] 46 App. U.S.C. § 1702(14) states that "'marine terminal operator' means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier . . . ." Although "person" is defined to include "individuals, corporation, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign government," it is undisputed that states and municipalities operating terminals on the water fronts are "persons" subject to the provisions of the Shipping Act. See State of California v. U.S., 46 F. Supp. 474 (N.D. Cal. 1942).

name, Flanagan and Royster, Premier alleges that Flanagan, in his capacity as Secretary of the Maryland Department of Transportation and Chairman of the Maryland Port Commission "directs the MPA," and that Royster, in his capacity as Executive Director of the MPA, has "direct authority over its functions." Id. The statutory language upon which Premier bases its claims, however, reaches "marine terminal operators," not directors or officers of marine terminal operators.

Premier contends, without support of any authority, that distinguishing between a marine terminal operator and its directors is "sophistry," as "[e]ntities do not operate independent of human beings." Opp. 24. Far from sophistry, recognizing legal distinctions between legally recognized organizations and the individuals who are the officers or directors of those organizations is something that courts do everyday. As Defendants aptly observe, "[c]orporations also do not operate independently of human beings, yet the law is well settled that the form of the entity cannot simply be ignored to allow claims to be stated against its officers absent very specific 'alter ego' allegations of the type Premier has not, and cannot, make here." Reply 11.

The Court notes that foiling Premier's attempt to circumvent MPA's sovereign immunity by naming MPA's directors as defendants does not undermine the statutory scheme created by the Shipping Act. In a recent Supreme Court case holding that sovereign immunity bars the FMC from adjudicating a private party's

complaint against a state port authority, the Court went on to opine that, despite this immunity, the FMC "remains free to investigate alleged violations of the Shipping Act, either upon its own initiative or upon information supplied by a private party and to institute its own administrative proceeding against a state-run port," and that "private parties remain perfectly free to complain to the Federal Government about unlawful state activity." Federal Maritime Com'n v. South Carolina State Ports Authority ,535 U.S. 743, 768 and 768 n. 19 (2002). Premier took its complaints to the FMC more than nine months ago and, while the FMC is free to investigate Premier's charges, it apparently has declined to do so.

In opposing the motion to dismiss, Premier makes one additional argument premised on § 11(h)(2) of the Shipping Act. That section provides that "[a]fter filing a complaint with the Commission under subsection (a) of this section, the complainant may file suit in a district court of the United States to enjoin conduct in violation of this chapter. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the Commission has issued an order disposing of the complaint." 46 App. U.S.C. § 1710(h)(2). Premier seems to argue that, because it has filed a complaint with the FMC and an appeal remains pending there, it is automatically entitled to an injunction from this Court

"maintaining the status quo pending final resolution by the FMC of Premier's complaint before that forum." Opp. 23.

This argument suffers the same infirmity as Premier's argument on the merits of its underlying Shipping Act claims. Section 11(h)(2) permits a district court to enjoin "conduct in violation of this chapter." The violative conduct to be enjoined is that of the marine terminal operator, MPA, not its directors. Because of sovereign immunity concerns, this Court cannot enjoin MPA.

The Court believes that this argument fails for another reason worthy of mention. Section 11(h)(2) allows for the grant of an injunction only "upon a showing that standards for granting injunctive relief by courts of equity are met." In the Fourth Circuit, this showing would be the same as that required to obtain an injunction under Rule 65 of the Federal Rules of Civil Procedure. See In re Microsoft Corporation Antitrust Litigation, 333 F.3d 517, 528-529 (4th Cir. 2003) (applying decisions under Rule 65 in reviewing the grant of an injunction under section 16 of the Clayton Act that allows for injunctions "under the same conditions and principles as injunctive relief . . . is granted by courts of equity"). The standard for an injunction under Rule 65 as set out by the Fourth Circuit in Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802 (4th Cir. 1991), and as recently summarized by one of our sister courts, requires:

> First, the moving party must make a "clear showing" that it will suffer irreparable harm if the court denies its request. [Direx] at 812-13. Second, if the moving party

> establishes irreparable harm, the next step is "to balance the likelihood of irreparable harm to the plaintiff from the failure to grant interim relief against the likelihood of harm to the defendant from the grant of such relief." Id. at 812. Third, if the balance tips decidedly in favor of the moving party, "a preliminary injunction will be granted if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful, as to make them fair ground for litigation and thus more deliberate investigation." Id. at 813. However, "if the balance does not tip decidedly there must be a strong probability of success on the merits." Id. Fourth, the court must evaluate whether the public interest favors granting preliminary injunctive relief. Id. at 814.

Southtech Orthopedics, Inc. v. Dingus, 428 F. Supp. 2d 410, 416 (E.D.N.C. 2006). Furthermore, the Fourth Circuit has cautioned that "preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." MicroStrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) ("courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction").

It is against this standard that Premier's stay request should have been evaluated when Premier first filed suit against MPA. Instead, by first filing bankruptcy, Premier was able to by-pass this review and obtain an automatic stay. Premier's strategy is understandable, as it is clear that Premier could not have obtained the relief it sought had it been put the task of

demonstrating its entitlement to an injunction. As to the balance of harms, while Premier perhaps could have made a showing of harm were it to lose Lot 90,[18] MPA contends that it will lose a tenant willing to sign a long term lease for Lot 90 if there is much further delay. For all of the reasons stated above, Premier can make no showing of likelihood of success on the merits. Finally, the public interest inherent in MPA's legislated mandate to increase waterborne commerce of the ports seems best served by allowing MPA to sign a long-term lease with a tenant willing to commit to terms most favorable to MPA.

III. CONCLUSION

For all of the above stated reasons, this Court concludes that the decisions of the Bankruptcy Court, as memorialized in Judge Schneider's June 8, 2006, Memorandum and Order, shall be affirmed, MPA's motion to dismiss the bankruptcy action shall be granted, and the motion to dismiss filed by Flanagan and Royster in the Shipping Act case will also be granted. In addition, the

[18] Whether Premier could make a "clear showing" of irreparable harm is less certain. There is evidence in the record casting some doubt as to the singular importance of Lot 90 to Premier's operations. See Reply Ex. 1, Feb. 17, 2005 Letter from Premier to MPA ("Clearance and design issues make [Premier's building on Lot 401] the only viable option for Premier to process RORO equipment, i.e., Case New Holland, McCormick Tractor, Buhler and Hino Diesel Trucks (U.S.A.), Inc., which constitutes most of our business.").

Court concludes that it will not find MPA and its counsel in contempt for the actions of June 12, 2006. A separate order consistent with this memorandum will issue.

/s/

William M. Nickerson
Senior United States District Judge

DATED: October 31, 2006